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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In Re: Petition of the Wireless Consumers Alliance, Inc. for a Declaratory Ruling on Communications Act Provisions and FCC Jurisdiction Regarding Preemption of State Courts From Awarding Monetary Damages Against CMRS Providers for Violation of Consumer Protection and Other State Laws	WT Docket No. 99-263

COMMENTS OF CENTENNIAL COMMUNICATIONS CORPORATION

Centennial Communications Corporation ("Centennial") submits these comments to alert the Commission to a new trend in class action lawsuits brought against CMRS providers in state courts. The clear and direct effect of the relief typically sought in these lawsuits would be to regulate CMRS providers' rates on a state-by-state basis. For the reasons presented herein, Centennial submits that the Commission should reject the Wireless Consumer Alliance's request for a ruling declaring that states are not preempted from awarding monetary relief against CMRS providers under state contract, tort and other laws.

I. BACKGROUND

Centennial is a provider of commercial mobile radio service ("CMRS"), serving approximately 470,000 customers in Michigan, Indiana, Ohio, Louisiana, Mississippi, Texas, California, Arizona and Puerto Rico.

In the past few years, a plethora of class action lawsuits have been filed throughout the country alleging that the rates CMRS providers are charging customers are improper. Centennial has not avoided this coordinated onslaught of litigation -- it is now the defendant in two "overbilling" class action suits filed in Louisiana in June 1999.[1] Two other very

[1] *Chicola v. Centennial Cellular Corporation,* Case No. C-99-9585 (filed June 9, 1999) ("*Chicola*"); *Abrusley v. Centennial Lafayette Cellular Corp.*, Case No. 99-380 (filed June 21, 1999) ("*Abrusley*").

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similar state suits with very similar state claims were filed against other Louisiana CMRS providers in June 1999.[2] The Commission should evaluate the request of the Petitioner in this proceeding in light of the potential nation-wide impact of state class-action suits that have been brought--and may be brought in the future--against CMRS providers around the country.

II. THE COMMUNICATIONS ACT GRANTS EXCLUSIVE AUTHORITY OVER CMRS RATE REGULATION TO THE COMMISSION AND PREEMPTS STATE RATE REGULATION

A. Congress Sought To Establish A National Regulatory Policy for CMRS

Since its inception in the early 1980s, the wireless telephone industry has grown at an astounding rate. As a result of this massive and sustained growth, wireless telephone services comprise an "integral part of the national telecommunications infrastructure."[3] Moreover, CMRS service differs substantially from traditional home or office telephone service because it operates without regard to state lines.[4] Cognizant of the sustained growth and interstate character of wireless telephone service, in 1993, Congress amended the Communications Act (47 U.S.C. § 151, *et seq*) to alter fundamentally the statutory structure governing wireless services in an effort to eliminate unnecessary and conflicting regulatory barriers and to foster continued growth and development. Specifically, Congress revised Section 332(c)(3) of the Communications Act through the Omnibus Budget Reconciliation Act of 1993 ("OBRA"),[5] to preempt state regulation of CMRS rates.

Section 332(c)(3) is essential to the new statutory regime established by Congress. In this regard, in the legislative history of the OBRA, Congress stated:

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[2] *Sutton's Steel & Supply, Inc. v. BellSouth Mobility, Inc.*, Case No. 91421, 16th JDC, Parish of Iberia; *Zyra R. Sonnier and Keither Bourque, et al. v. Radiofone, Inc.*, Case No. 44-844, 25th JDC, Parish of Planquemines.

[3] H.R. Rep. No. 103-111 at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587.

[4] Indeed, cellular service areas frequently include portions of multiple states and, because wireless telephones are portable, they are routinely used in more than one state.

[5] Pub. L. No. 103-66, § 6002, 107 Stat. 312 (1993).

> [B]ecause commercial mobile services require a Federal license and the Federal Government is attempting to promote competition for such services, and because providers of such services do not exercise market power vis-a-vis telephone exchange service carriers and State regulation can be a barrier to the development of competition in this market, uniform national policy is necessary and in the public interest.[6]

Moreover, as explained by the Commission, Section 332 was critical because Congress sought "to establish a national regulatory policy for CMRS, not a policy that is balkanized state-by-state."[7] In short, preemption of state rate regulation plays a critical role in Congress' statutory scheme because it provides for a uniform, stable and *nationwide* regulatory environment for CMRS providers.

In the Commission's recent Declaratory Ruling and Proposed Notice of Rulemaking concerning Calling Party Pays Service, the Commission recognized that "the Communications Act establishes as a primary mission of the Commission regulation of interstate and foreign communications so as to make available to all the people of the United States a rapid, efficient Nation-wide, and world-wide wire and radio communications service."[8] The Commission also cited its statutory mandate to "establish a federal regulatory framework to govern the offering of all [CMRS]."[9] Here, if the Petitioner's request were to be granted, the result would be the very sort of piecemeal treatment of CMRS rates that Congress and the Commission wish to prevent.[10]

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[6] See 139 Cong Rec S 7995-7996.

[7] *State of California Regulatory Authority Over Intrastate Cellular Service Rates*, 10 FCC Rcd. 7486, 7499 (1995) (footnote omitted).

[8] In the Matter of Calling Party Pays Offering in the Commercial Radio Services, WT Docket No. 97-207, *Declaratory Ruling and Notice of Proposed Rulemaking*, (rel. July 7, 1999) at Para. 36.

[9] *Id.* at para. 35.

[10] *Id.* citing H.R. Rep. No. 103-111, at 261 (1993) and Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499, 15298, 16006 (paras. 861, 1025) (1996).

B. The Commission Has Exclusive Jurisdiction Over CMRS Rates

As noted above, Congress expressly preempted the states from regulating any aspect of the rates charged by CMRS providers. Specifically, Section 332(c)(3) of the Communications Act provides that "no State . . . shall have any authority to regulate the entry of or the rates charged by any commercial mobile service." 47 U.S.C. § 332(c)(3). Thus, Congress empowered the Commission — not the states — to regulate rates charges by CMRS providers. This restriction has been well-recognized by both the Commission and the courts.[11]

A broad array of courts have ruled that Section 332(c)(3) preempts state law claims challenging the reasonableness of wireless billing practices. For example, in *Ball v. GTE Mobilnet of Cal., Ltd.*, No. 98AS03811 (Cal. Super. Ct. (Sacramento Co.) Nov. 17, 1998) ("*Ball*"), the court dismissed a state law suit challenging GTE's practice of (1) "rounding up" to a full minute; (2) "send to end," which includes charging for nonconversation time; (3) charging for ringing time for complete calls but not for incomplete calls; (4) charging full rates for incomplete calls; and (5) charging for "lag time." The court dismissed "on the ground that the Federal Communications Act preempts all state regulatory authority over

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[11] For Commission statements, *see, e.g., Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, Second Report and Order 9 FCC Rcd. 1411, ¶ 12 (1994) (Section 332 "preempt[s] state regulation of entry and rates for both CMRS and PMRS providers"), *recon. granted in part*, 10 FCC Rcd. 7824 (1995), *recon. denied*, 11 FCC Rcd. 19729 (1996); *Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services*, Report and Order, 10 FCC Rcd. 7842, ¶ 8 (1995) (Section 332(c)(3) "express[es] an unambiguous congressional intent to foreclose state regulation in the first instance"), *recon. denied*, 10 FCC Rcd. 12427 (1995); *Implementation of Section 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, Notice of Proposed Rulemaking, 8 FCC Rcd. 7988, ¶ 79 (1993) ("Section 332(c)(3)(A) preempts state and local rate and entry regulation of all commercial mobile services").

For court statements, see e.g., *Connecticut Dept. of Pub. Util Control v. FCC*, 78 F.3d 842, 846 (2d Cir. 1996) (in Section 332(c)(3), "Congress provided a general preemption of state [CMRS] regulation"); *In re Topeka SMSA Ltd. Partnership*, 917 P.2d 827, 832 (Kan. 1996) (Section 332(c)(3) "preempts state or local regulation of the rates charged by any provider of CMRS"); *Metro Mobile CTS of Fairfield Co., Inc. v. Dep't of Pub. Util. Control*, 1996 WL 737480 at *1 (Conn. Super. Ct. Dec. 11, 1996) (through Section 332, "Congress has preempted the [Connecticut State Dept. of Public Utility Control] from exercising licensing or rate-making authority relative to the provision of cellular telephone services by cellular providers").

wireless service areas." Another court concluded that all state law claims having an impact on wireless rates are preempted by Section 332. *Simmons v. GTE Mobilnet, Inc.*, No. H-95-5169 (S.D. Tex. Apr. 11, 1996), slip op. at 4, 5 ("Congress has expressly and completely preempted the entire field of rate regulation under section 332(C)(3)(a)"; "all state law claims related to the field of rate regulation are completely preempted by section 332(c)(3)(A)"). *See also, In re Comcast Cellular Telecomm. Litigation*, 949 F. Supp. 1193, 1201 ("the claims alleged by the Plaintiffs present a direct challenge to the way in which Comcast actually calculates the length of a cellular phone call and the rates which are charged for such a call. Thus, any state regulation of these practices is explicitly preempted under the terms of the Act."); *Rogers v. Westel-Indianapolis Co.*, No. 49D03-9602-CP-0295 (Marion Super. Ct. (Ind.) July 1, 1996) (dismissing "non-disclosure" claims as preempted where the request for damages requires a change of rates); *Powers v. Airtouch Cellular*, No. N71816 (Cal. Super. Ct. (San Diego Co.) Oct. 6, 1997 ("*Powers*") Slip Op. at 1 (dismissing claims relating to the carrier's failure to disclosure its practice of charging for "teardown" time as rate regulation, stating: "Congress has made clear in [Section 332(c)(3)] its intent to pre-empt all state regulation of rates charged for cellular service.").

C. The Class Action Suits Generally Challenge The Rates Charged By CMRS Providers

Although not explicitly framed as such, the class action suits filed against CMRS providers generally challenge the *rates* charged by these entities. For example, in the *Chicola* class action suit filed against Centennial in Louisiana state court, the plaintiff expressly asks for a money judgment against Centennial for its alleged practice of charging for calls that are "unanswered" or "discarded." Similarly, in the *Abrusley* class action suit, the plaintiff seeks monetary damages for Centennial's alleged practice of billing for "non-communication" time and for rounding up to whole minute increments for billing purposes. In both cases, the plaintiffs have framed their charges as a "breach of contract," "fraud," "misrepresentation" and/or "failure to disclose." Window dressing aside, such suits are aimed directly at CMRS providers' rates.

The Supreme Court has cautioned against adopting too restrictive a definition of "rates," stating: "[r]ates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa. *AT&T Co. v. Central Office Tel., Inc.*, 118 S. Ct. 1956, 1963 (1993). A host of other state and federal courts have adopted a broad, practical meaning of the term "rates" with respect to Section 332.[12]

The class action suits challenge CMRS providers' rates in two ways. First, the plaintiffs typically seek ***compensatory damages*** in the form of a rate refund based upon what class members would have been charged if the CMRS provider not engaged in the purported conduct. Such an award would effectively require the court to retroactively adjust the CMRS provider's rates.

Second, a CMRS provider can choose from a number of different options in deciding whether and how to charge for calls, including those that are "unanswered" or "discarded." These decisions are part and parcel of the rates charged by the CMRS provider. These suits seek to alter and constrain the CMRS provider's rate plans and pricing options. Courts have frequently recognized that such a result constitutes rate regulation. For example, in *Comcast Cellular Telecomm. Litigation*, 949 F. Supp. 1193, 1201, 1203-04 (*"Comcast Cellular"*) the court held:

> the claims alleged by the Plaintiffs present a direct challenge to the way in which Comcast actually calculates the length of a cellular phone call and the rates which are charged for such a call. Thus, any state regulation of these practices is explicitly preempted under the terms of the Act.
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> Plaintiffs have made a series of state law and common law allegations against Comcast. While none of these claims pose an explicit challenge to the rates

[12] *See Simmons v. GTE Mobilnet, Inc.*, No. H-955169 (U.S.D.C., S.D. Tex. 1996); *Powers v. AirTouch Cellular*, No. N71816 (Cal. Super. Ct. (San Diego County) 1997); *see also Marcus v. AT&T Corp.*, 938 F. Supp. 1158, 1170 (S.D. N.Y. 1996), *aff'd*, 138 F.3d 46 (2d Cir. 1998); *Nova Cellular West, Inc. v. AirTouch Cellular of San Diego*, No. 98-02-026 (CPUC Sept. 3, 1998).

> charged by Comcast for cellular phone service, a careful reading of the complaint and the remedies sought by the Plaintiffs demonstrates that the true gravamen of the complaint is a challenge to Comcast's rates and billing practices. . . . All state regulation of the rates charged by CMRS providers is explicitly preempted by the language of the Act. *See* 47 U.S.C.A. § 332.

Similarly, the *Ball* court (citing *Comcast Cellular*), expressly found that plaintiffs' challenges to GTE's practices of charging for incomplete calls, nonconversation time, ringing time and lag time, were about GTE's *rates*. Slip Op. at 1. And in *Powers*, the court dismissed claims relating to the carrier's practice of charging for call "teardown" time as "direct challenges to the calculation of the rates charged by Defendant Airtouch." Slip Op. at 2.

Likewise, the Commission should recognize that the clear and direct effect of the relief typically sought in class action lawsuits would regulate CMRS providers' rates under state law standards.

D. Damage Awards Constitute Rate Regulation

The Commission should recognize that damage awards constitute a form of state regulatory action prohibited by Section 332(c)(3). Generally, the common-sense and ordinary meaning of "regulate" is broad: to regulate is to "govern or direct according to rule," to "fix, establish, or control," and to "subject to governing principles of laws." BLACK'S LAW DICTIONARY 1286 (6th ed. 1990). Thus, damage awards unquestionably *can* constitute a form of state regulation that is indistinguishable from legislative or executive activity.
The U.S. Supreme Court has indicated that the award of damages would amount to state regulation of rates. In *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981), which involved a breach of contract claim regarding the purchase of federally rate-regulated natural gas, the Court held that "[n]o matter how the ruling of the Louisiana Supreme Court [granting damages] may be characterized, . . . it amounts to nothing less than the award of a retroactive rate increase."[13] The Supreme Court has further held that: "[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The

[13] *Id.*, at 578. *See also id.* at 584.

obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959).[14]

In the context of Section 332, one federal district court has stated: "[i]t is undisputed that like legislative or administrative action, judicial action constitutes a form of state regulation. Thus, like state legislative action, state court adjudications threaten the uniformity of regulation envisioned by a congressional scheme." *Comcast Cellular*, 949 F. Supp. at 1201 n. 2. Other courts have reached the same conclusion in the context of cases challenging CMRS carriers' practices of "rounding up" calls to the next minute for billing purposes,[15] or other similar situations.[16]

Where the suit is a class action suit, as is typically the case, there can be little doubt that an award of damages would constitute rate regulation. By their nature, class action cases affect not just a single customer; rather, they affect the rates of the entire customer base by seeking across-the-board relief, resetting retroactively the carrier's general prices, and by altering its choices of services for which it may charge. The prohibited ratemaking effects of a damage award are exacerbated in a class action because they would result in both a

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[14] *See also, Medtronic, Inc. v. Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring) ("'[state] regulation can be as effectively exerted through an award of damages as though some form of preventive relief.'") (alteration in original) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992)).

[15] *See, e.g., Hardy v. Claircom Communications Group*, 937 F.2d 1128, 1132 (Wash. Ct. App. 1997) ("any court-imposed award of damages [as a result of rounding up] would by definition in [plaintiffs] paying something other than the filed rate."); *Comcast Cellular*, 949 F. Supp. at 1204 ("a state court would be prevented from giving Plaintiffs the remedies they seek [including compensatory damages] without engaging in regulation of the rates of a CMRS provider"); *Marcus v. AT&T Corp.*, 938 F. Supp. 1158, 1171 (S.D.N.Y. 1996) (in invoking the filed rate doctrine, stating that "to require [defendant IXC] to pay damages here would mean that these plaintiffs . . . are entitled to a reduced rate . . .").

[16] *See e.g., Fax Telecommunications v. AT&T Co.*, 952 F. Supp. 946, 954 (E.D.N.Y. 1996) (enforcing a contract rate that requires a court to determine a reasonable rate is unlawful ratemaking); *Wegoland, Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1119-22 (S.D.N.Y. 1992) (refund damages award would effectively require a court to determine a reasonable rate), *aff'd*, 27 F.3d 17 (2d Cir. 1994).

retroactive rate decrease for all of the CMRS providers' customers and a lasting change in its rate structure. Section 332(c)(3) intends that any such broad-ranging impacts on rates can be achieved only by Commission action.

E. Plaintiffs Have A Remedy Under The Communications Act - A Complaint To The Commission

Section 207 of the Communications Act, 47 U.S.C. § 207, provides that a party seeking to challenge a CMRS provider's rates may bring a complaint to the Commission under Section 208 of the Communications Act, 47 U.S.C. § 208. Recovery of damages is available under this form of relief. For whatever reason, the plaintiffs in class action suits forego this form of relief, despite Congress' clear mandate that CMRS rate regulation is a matter for the Commission. Section 208 provides recourse for consumers who are aggrieved by the actions of common carriers, including CMRS providers. The Commission's supervision of Section 208 complaint proceedings, if brought against a CMRS provider, could provide reasonable limits on discovery demands. It is highly burdensome (as it is surely intended to be) for CMRS providers to be involved in extensive, expensive and time-consuming discovery and litigation on similar issues around the nation. This is especially true for class action litigation. Although this may be an effective plaintiff's strategy, it should be recognized for what it is: a tactic to obtain either quick monetary settlement or the effective lowering of CMRS rates. The Commission should not countenance such a balkanization of its CMRS rate-making authority.[17] Rather, the FCC should preempt such efforts and maintain a nationwide framework for CMRS rate regulation.

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[17] Section 207 of the Communications Act also provides that "any person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission....or may bring suit for the recovery of damages...in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies." Perhaps the reason that most, if not all, of the recent class action suits against CMRS providers have been brought in state court, rather than federal district court, is that federal district courts generally have more stringent requirements for class action suits, and for the certification of a plaintiff class. Clearly, there has been a strategic choice made by plaintiffs and their lawyers *not* to seek relief before the FCC or the federal district courts.

III. CONCLUSION

For the reasons explained above, the request of the Petitioner, Wireless Consumers Alliance, Inc., should be denied. Specifically, Centennial Cellular Corporation requests that the Commission (1) adopt a broad definition of the term "rates," which includes such common billing practices as rounding up to the whole minute, billing for "non-communication" time on mobile phone calls and the like, (2) declare that Congress has preempted state regulation of these matters and that the Commission has exclusive jurisdiction over their regulation, and 3) reject the Wireless Consumer Alliance's request for a ruling declaring that states are not preempted from awarding monetary relief against CMRS providers under state contract, tort and other laws.

Respectfully submitted,

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September 10, 1999

CERTIFICATE OF SERVICE

I, Debra Sloan, do hereby certify that on this 10th day of September, 1999, a true and correct copy of the Comments of Centennial Communications Corporation has been sent via U.S. Mail to the following:

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